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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1164

HILLTOP REALTY, INC., ET AL., *Petitioners*,

v.

SEATTLE-FIRST NATIONAL BANK, AS EXECUTOR OF THE ESTATE OF LAURENCE P. SMITH, ET AL., *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CITATION NOTE

Citations in this brief to the certified transcript will be in the following form: (R. ——), referring to the record, and (Tr. ——), referring to the reporter's transcript of the trial. Citations to the petition for certiorari to which this brief is addressed will be (Pet. ——). The opinion of the Court of Appeals is reproduced in the appendix to that petition, so citations in this brief to the opinion will be to the appendix, thusly: (Pet. A. ——).

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Respondents, Seattle-First National Bank, as Executor of the Estate of Laurence P. Smith, et al., submit this brief in opposition to the petition of Hilltop Realty, Inc. et al. for a writ of certiorari.

I.

QUESTIONS PRESENTED

1. Can plaintiffs recover for fraud, breach of contract or violation of antitrust statutes in an action based upon the making of an allegedly false economic report where the report is not false and plaintiffs have sustained no damage?

2. Where plaintiffs consent to a trial to the court of all issues under the fraud and contract counts, are they entitled to a second trial before a jury of the identical facts under the antitrust counts?

II.

COUNTERSTATEMENT OF THE CASE

A.

Narrative of the Controversy

This action was brought by Hilltop Realty, Inc. (hereinafter "Hilltop"), an Ohio corporation engaging in the real estate brokerage business, and by Mmes. Mildred Winslow Ashcraft and Aileen D. Winslow Powell (hereinafter "the sisters"), the owners of a farm, known as "Nutwood", located in the eastern suburbs of Cleveland, Ohio. The defendants were various partners and employees of Larry Smith & Company and their wives, The Austin Company and two other corporations. Larry Smith & Company was a partnership engaged in the business of making economic reports, particularly with reference to shopping centers. The senior partner, Laurence P. Smith, more often called Larry Smith, died during the pendency of the appeal to the Ninth Circuit, and his executor, the Seattle-First National Bank, was substituted as a party.

In late 1959, Larry Smith & Company (hereinafter "Smith") was hired by Hilltop to study the economic feasability of a proposed shopping center at Nutwood (R. 1188, 1202). Smith conducted such a study and in January 1960 submitted a report to Hilltop which expressed Smith's conclusion that insufficient retail sales potential existed to justify development of the site for shopping center purposes (R. 1212). Hilltop paid Smith $2920 for the report (Ex. 7, Tr. 2527).

In April, 1960, Nutwood was sold for $3500 per acre to a Cleveland developer, Ridge Hills Development Company (Tr. 1238), which purchased it for shopping center development (Tr. 1695). Hilltop was retained by Ridge Hills to promote the site for such development, which it did for several years (Tr. 1652). Despite Hilltop's efforts, no retail development had been undertaken at Nutwood by the time of trial in this action, more than five years after the sale to Ridge Hills.

For several years prior to the time that Smith was hired by Hilltop, Smith was a consultant to The Austin Company with respect to the development of a shopping center at a site known as "Longwood" or "Severance" some seven miles southwest of Nutwood (R. 1657, 1268). By mid-1959, Smith was engaged in negotiations with Austin for the purchase by Smith of an interest in the Severance property (R. 1180). Smith told Hilltop of its relationship to Severance as a consultant, and even "emphasized the conflict of interest" which might arise from advising the respective owners (R. 1191-92, Tr. 479-80). Hilltop considered that there would be no conflict between the sites and decided to hire Smith anyway (R. 1188-89, Tr. 291-94). Smith did not, however, advise Hilltop that it was contem-

plating the purchase of an interest in Severance (R. 1248). The failure to disclose that fact, although no harm flowed from it, is the basis for this long and pointless lawsuit.

B.

Summary of Proceedings

In January, 1963, Hilltop filed a complaint against some of the Smith partners, alleging damages in four alternative claims: fraud, breach of contract, violation of the Ohio antitrust laws and violation of the Sherman Act. Each claim was founded on allegations that Smith had intentionally and maliciously produced a false report concerning the market potential of Nutwood for regional shopping center purposes. Damages were based upon the premise that Nutwood was sold for less than its true value, in misplaced reliance on the false report. A jury was demanded (R. 1-14).

In July, 1964, a first amended complaint was filed (R. 100-21). The sisters were joined as parties plaintiff, several additional Smith partners and corporate affiliates and Ray L. Treiger, the Smith employee who had been in charge of the Nutwood study, were added as defendants, The Austin Company was added as a defendant as to the federal antitrust claim, and the prayer was increased from $1,312,500 to $8,862,500. This increase was on the assertion that Nutwood's real value had been $20,000 an acre (R. 110) instead of $6,000 as claimed in the original complaint (R. 6).

Pretrial discovery was conducted by plaintiffs on a grand scale, producing a total of 5517 pages of depositions; much of the discovery was directed toward the alleged antitrust violations. Detailed contentions were eventually filed by plaintiffs in early 1965 (R. 651-91),

and various motions for summary judgment came on for hearing.

On April 7, 1965, the District Court entered orders dismissing both the federal and state antitrust claims (R. 948-55). Since The Austin Company had been joined only as to the claimed federal antitrust violation, it was dismissed with prejudice (R. 948-49). By orders entered June 10, 1965, the court also dismissed defendants Winmar Holding Company, Inc., a Smith affiliate, and Ray L. Treiger (R. 1026-27).

Following the dismissal of the antitrust counts, plaintiffs waived their jury demand as to the fraud and contract counts, but not as to antitrust (R. 1010-11, 1053-54). The factual issues to be tried in the fraud and contract counts were, however, common to the antitrust claims, and, if found adversely to plaintiffs, dispositive of all four counts (See amended complaint, R. 100-21, and plaintiff's contentions, R. 651-91).

Trial was held to the court in July and August, 1965, but judgment was not entered until May, 1966. In that judgment, the trial court dismissed the contract claim, but gave plaintiffs judgment on the fraud claim. Hilltop was awarded the price of the report, $2920, as compensatory damages and $40,000 in punitive damages; the sisters also were awarded $2920 in compensatory damages and $35,000 in punitive damages. Plaintiffs were jointly awarded $75,000 in attorneys' fees (R. 2146-50).

Smith appealed the judgment on the fraud count to the United States Court of Appeals for the Ninth Circuit; Hilltop and the sisters cross appealed from the dismissal of the remaining counts. The District Court had found, in two memorandum opinions, that the

Smith report was not false and that plaintiffs had not shown that Nutwood was worth any more than the price paid by Ridge Hills (R. 1469-70). Nonetheless, the District Court gave plaintiffs judgment on the fraud count. This anomaly led the Court of Appeals to observe:

> "One might reasonably inquire how it is, in the face of these findings and this record, that the court nevertheless entered the judgment on count one from which the appeal is taken. The court's oral remarks and written decision make the reason clear. The court believed that Smith deliberately concealed from Hilltop the fact that Smith had a proprietory interest in Longwood, leading Hilltop to believe that Smith had no greater interest in Longwood than in Nutwood. However, the court's sense of moral outrage did not lead it to find that the report was materially false, or that the concealment was for the purpose of damaging the plaintiffs (the court thought it was not), or that the plaintiffs were damaged in the manner or in the amount claimed by them. But it did lead the court to try to find some other theory of damage as a means of punishing Smith. It seized on the notion that Smith should be required to pay to both Hilltop and the sisters, separately, $2,920.00, the price that Hilltop paid for the report. Thus the judgment requires that Smith pay double the price received, plus two large amounts of punitive damages, plus equally large amounts of attorney's fees. Yet the court held that there was no breach of contract, and dismissed the breach of contract count. We know of no possible way in which to sustain so remarkable a result. In the face of the findings that the conclusions of the Smith report were not wrong and that no damage was sustained in the sale of Nutwood, the judgment on count one cannot stand." (Pet. A. 5-6).

Accordingly, the Court of Appeals reversed the judgment on the fraud count with directions to enter a judgment for defendants. The judgment of dismissal of the contract count was affirmed, as was the summary judgment of dismissal of the antitrust counts. (The judgment of the Court of Appeals, omitted from the petition, is appended to this brief).

III.

ARGUMENT IN OPPOSITION TO ISSUANCE OF THE WRIT

A.

Petitioners Are Not Entitled To Relitigate the Factual Issues Before a Jury

Petitioners' first argument is that they were deprived of a right to a jury trial on the federal antitrust count. However the cases cited do not support the position apparently set forth in the petition, and the decision of the Court of Appeals in affirming dismissal of the Sherman Act count was clearly correct.

The case principally relied upon, *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), is entirely irrelevant. In *Story*, this Court held that where the fact of damage is clear, a jury may estimate the amount of damage from evidence which is less than conclusive. No issue of denial of jury trial was involved in that case. Nor does the instant case present the issues found in *Story*. There is no problem here of estimating damages; rather, it has been established that there were no damages. The District Court found as follows:

> "The court has not been persuaded that the conclusions reached in the Nutwood market analysis were wrong. This is not to say that the analysis was free from error, but the plaintiffs relied on

the conclusions of the report and not on the details of the analysis in making their decision to sell the property to Ridge Hills. However, assuming arguendo that the report in and of itself would constitute fraud or breach of contract, the court finds that the plaintiffs have failed to establish by the requisite burden of proof that as a result of such fraud or breach of contract the plaintiffs sustained any damage in the sale of the Nutwood Farm property. . . .

"The plaintiffs also contended that but for the lack of a favorable market analysis they would have been able to find a buyer for Nutwood Farm who was willing to pay more than did Ridge Hills. On the state of the evidence adduced in this case, such contention amounts to no more than speculation or conjecture. Accordingly, the contract cause of action will be dismissed with prejudice." (R. 1469-70).

After quoting the foregoing findings, the Court of Appeals held that

"These findings are fully supported by the record; by no stretch of the imagination can they be said to be clearly erroneous. That the conclusions of the report were correct and that the plaintiffs did not suffer the damages they claimed, is shown by the record almost to a moral certainty. Several weeks before the delivery of the Smith report another Cleveland developer, Ridge Hills, had begun negotiations with Hilltop for the purchase of Nutwood. The Smith report was mailed to Hilltop on January 8, 1960. On January 13, 1960, Ridge Hills offered to buy the property at $3,500 per acre. At the time it was assumed that Ridge Hills was interested in the property for a shopping center and even after the Smith report Petti, the president of Hilltop, continued to extol

the Nutwood property as highly suitable for a shopping center. In fact, Petti urged that if Ridge Hills should purchase the site, Hilltop should be made the exclusive rental agent for prospective store lessees. There is no evidence that Ridge Hills knew of anything but the favorable aspects of the Smith report. On April 29, 1960, the sale of Nutwood to Ridge Hills was completed. For two years following the sale, Hilltop, through Petti, acted as exclusive agent in promoting Nutwood as a regional shopping center. All of Petti's very extensive efforts were unsuccessful, even though he at no time revealed the negative aspects of the Smith report to anyone, and there is no evidence that anyone else did. The proof of the pudding is in the eating. Here, the actual events following the sale of Nutwood demonstrate both that it was not a good shopping center site and that the Smith report was not the cause of a sale of Nutwood at a low price. It was sold for what it was worth." (Pet. A. 4-5).

The other cases relied upon by petitioners are equally irrelevant. *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F. 2d 709 (9th Cir. 1959), and *Fox West Coast Theatres Corp.* v. *Paradise Theatre Building Corp.*, 264 F. 2d 602 (9th Cir. 1958), also are concerned with the question of the sufficiency of evidence to sustain jury verdicts, and have no application here.

Hoopes v. *Union Oil Co. of California*, 374 F. 2d 480 (9th Cir. 1967), reversed a summary judgment granted on the ground that the plaintiffs lacked standing to sue under the Sherman Act. *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir. 1964), reversed a judgment for the defendant because of erroneous instructions. These cases also have no bearing on petitioners' claim that they were denied a jury trial.

Petitioners' claim was disposed of by the Ninth Circuit on grounds which are clearly correct. The controlling factor is that petitioners consented to a non-jury trial of the issues of fact which were determinative of their antitrust claims. The matter was very aptly summarized by the Court of Appeals.

> "In a statement of factual contentions, filed by court order, the plaintiffs restated and amplified their case, as to each count. They make it quite clear that their anti-trust counts, as well as their fraud and contract counts, depend upon the making by Smith of a fraudulently false report. And as to each count the statement concludes with the following paragraph:
>
> > 'Defendants' wrongful acts were the proximate cause with the foreseeable results of plaintiff's damage in selling Nutwood at $3,500 per acre when its true value was a minimum of $20,000 per acre.'
>
> It is clear that the making of a false report by Smith, and a consequent sale of Nutwood at a price less than it was worth, are central to the claim stated in each count. Thus, as to the fourth, Sherman Act, count, it is stated that the purpose of the conspiracy was to preclude the development of shopping centers other than Longwood on the east side of Cleveland, and that Smith therefore pursued and secured the contract to make a report on Nutwood and delivered a false report because 'discouragement of Nutwood was a necessary step to Smith's continued success . . . a favorable report on Nutwood would have meant competition' for Longwood." (Pet. A. 3-4).

As noted above, the District Court had found that the report was not false and that no damage had been sustained in the sale of Nutwood. The Court of Ap-

peals emphatically agreed. Those findings were fatal to petitioners on all counts of the complaint.

Petitioners argue that they are entitled to retry the same issues, since a jury might reach different conclusions than the trial judge. That argument also was completely answered by the Court of Appeals.

> "The difficulty with this argument at this stage of the case is that the alleged facts of fraud and damage are the same throughout the four counts of the complaint, and a favorable finding on both would be necessary to recover on either of the anti-trust counts. But plaintiffs voluntarily tried these issues to the court on the fraud and contract counts. They lost on both issues and we affirm the findings of the trial court. Therefore, on remand plaintiffs would be estopped to reopen either of these issues by principles of *res judicata* and law of the case. See *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 1954, 347 U.S. 89, 100-101; *Arnold* v. *Arnold*, 9 Cir., 1966, 356 F. 2d 873; *Warren* v. *Lawler*, 9 Cir., 1965, 343 F. 2d 351; *Clinton* v. *Joshua Hendy Corp.*, 9 Cir., 1960, 285 F. 2d 848, *cert. den.* 366 U.S. 932; *Morgan* v. *Inter-Continental Trading Corp.*, 7 Cir., 1966, 360 F. 2d 853." (Pet. A. 8).

No matter how the relationship between the counts of the complaint is analyzed, the decision on the fraud and contract counts bars any further litigation. If a further trial would be considered as relitigation of the same cause of action, then it is of course barred because the first decision is *res judicata*. *Cromwell* v. *County of Sac*, 94 U.S. 351 (1877). It is not necessary that the second action be brought on the same theory. If the wrong alleged is the same, the second action is not a new one, and is barred by an adverse judgment

in the first action. *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F. 2d 362 (5th Cir. 1961); *Clinton* v. *Joshua Hendy Corp.*, 285 F. 2d 848 (9th Cir. 1960), *cert. den.* 366 U.S. 932 (1961); *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464 (3rd Cir. 1950), *cert. den.* 341 U.S. 921 (1951).

If a new trial on the antitrust counts were considered as a new and distinct action, relitigation of the same issues of fact would be barred by the doctrine of collateral estoppel. *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89 (1954).

Finally, if a further trial on the remaining counts were considered to be a continuation of the present case, relitigation of the issues of misrepresentation and damage would be foreclosed by the law of the case. *Atlas Scraper & Engineering Co.* v. *Pursche*, 357 F. 2d 296 (9th Cir. 1966), *cert. den.* 385 U.S. 846 (1966), *reh. den.* 385 U.S. 1020 (1967), quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895).

Therefore, as the Court of Appeals held, there would be no point in remanding for a jury trial on the antitrust counts since there would be nothing to submit to the jury. A right to jury trial exists only where issues of fact remain. See *Oklahoma Contracting Co.* v. *Magnolia Pipe Line Co.*, 195 F. 2d 391 (5th Cir. 1952), *cert. den.* 344 U.S. 921 (1953).

Petitioners are thus faced with the necessity of overturning the holdings of both courts below that the report was not false or fraudulent and that Nutwood was sold for its full value. There is nothing in their petition which even attempts to do so. The evidence on those issues is so clear that, had there been a jury, a directed verdict would have been mandatory. The

trial court held that the contention that Nutwood was worth more than $3500 per acre amounted "to no more than speculation or conjecture." (R. 1470). Under such circumstances there is nothing to send to a jury. *McCleneghan* v. *Union Stock Yards of Omaha,* 349 F. 2d 53 (8th Cir. 1965); *Wolfe* v. *National Lead Co.,* 225 F. 2d 427 (9th Cir. 1955), *cert. den.* 350 U.S. 915 (1955).

B.

Petitioners Are Not Entitled To Any Recovery on Any Theory

Petitioners in their second argument seem to contend that Smith was unjustly enriched by receiving payment for the Nutwood report. It is not clear what relief is sought, but in any event the argument is without merit.

First, unjust enrichment is a theory never presented to either of the courts below. Petitioners sued for damages under various theories, in each case measured by the alleged loss sustained upon the sale of Nutwood. At no time was there any demand for restitution of the price paid for the report. Petitioners are thus precluded from seeking reversal on the theory of unjust enrichment, since new theories of recovery cannot be advanced for the first time on appeal. *Chicago & Eastern Illinois R. Co.* v. *Southern Ry. Co.,* 261 F. 2d 394 (7th Cir. 1958).

Second, it is clear that petitioners are not entitled to recovery on any theory, including unjust enrichment. Each of the courts below found that the report was accurate and that Smith fully performed its contract.

Petitioners' entire case, both here and below, is based upon the fact that Smith did not disclose its full connection with Severance. No matter what theory of recovery petitioners might assert, they could not recover for the simple reason that they have sustained no damage.

IV.

CONCLUSION

There is no error in the decision of the Court of Appeals. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX